United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

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No. 19678

FRANK W. HOLMES, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the District of Columbia

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United States Attorney.

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C.A. No. 1283-65

QUESTION PRESENTED

In a motion to vacate sentence under 28 U.S.C. § 2255, can appellant indirectly raise the issue of insanity at the time of the offense of which he was convicted—an issue not cognizable as a ground for collateral attack—by alleging ineffective assistance of counsel in that his retained trial counsel did not raise the insanity defense?

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COUNTERSTATEMENT OF THE CASE

Frank W. Holmes was convicted of robbery and impersonating a police officer [1] and in May 1964 was sentenced by Judge Curran of the District Court to a prison term of one to four years. On appeal his conviction was

[1] Appellant was charged in a four-count indictment in Criminal Case No. 1215-63 with impersonating a police officer (two counts, one under 22 D.C. Code § 1304 and one under 22 D.C. Code § 1306), robbery and assault with intent to commit rape. The trial court granted a motion for judgment of acquittal on the second of the two impersonation counts, and the jury found appellant not guilty of assault with intent to commit rape under count four.

affirmed by this Court without opinion. *Holmes* v. *United States*, No. 18819, decided December 3, 1964. On May 26, 1965, Holmes filed in the District Court a motion to vacate sentence pursuant to 28 U.S.C. § 2255, which the court denied after a hearing on June 11. Leave to appeal *in forma pauperis* was granted by the trial court.

The principal ground of appellant's § 2255 motion was that his retained trial counsel, Thomas M. O'Malley, Esq., had not given him adequate representation in that he had not raised the defense of insanity and had not advised appellant that such a defense might be available.[2] Prior to trial Mr. O'Malley had requested from Dr. Hyman D. Shapiro,[3] a psychiatrist in private practice, a report on appellant's mental condition, and Dr. Shapiro responded on January 31, 1964, with a four-page document (Tr. 44). Dr. Shapiro, testifying at the § 2255 hearing, stated that he had treated appellant for "a nervous condition" (Tr. 4) during November of 1962. At that time, in the doctor's opinion, appellant was suffering from a mental disease or defect which he diagnosed as a "psychoneurosis with anxiety and depression, chronic, superimposed upon the schizoid personality makeup" (Tr. 5). Dr. Shapiro did not see appellant again until December 30, 1963, at which time he was still suffering from the same affliction. In the doctor's opinion, the crimes of which appellant was convicted[4] were "definitely a product of his long standing mental disorder." He had not communicated this opinion to anyone, however, until March of 1965, when he gave appellant's new counsel a written report to the effect that the crimes were a product of appellant's mental condition (Tr. 7). The doctor had given Mr. O'Malley only his diagnosis and findings, together with certain

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[2] Other contentions made by appellant below are evidently not being urged on appeal.

[3] The doctor's first name is erroneously given as "Herman" in the transcript (Tr. 3).

[4] The offenses were committed on November 8, 1963.

background information.[5] When asked by the court why he had not told Mr. O'Malley that in his view there was a causal connection between appellant's mental condition and his criminal acts, Dr. Shapiro replied, "I was not asked for that, so I didn't volunteer it. I thought perhaps I would be called as a witness" (Tr. 11). Finally, Dr. Shapiro had examined appellant in the District of Columbia Jail on June 10, 1965, the day before the § 2255 hearing, and had found him "essentially in the same condition except that he appeared to have more insight into his difficulties for the time he spent in confinement" (Tr. 12-13).

Appellant himself testified that he had never seen Dr. Shapiro's report of January 31, 1964, until his new counsel showed it to him at the jail after he had obtained it from Mr. O'Malley and that he was never aware of the doctor's diagnosis prior to trial[6] (Tr. 15). The court reminded appellant that he had opposed the Government's motion for a mental examination and had informed the court by affidavit (see footnote 5, *infra*) that he did not intend to rely upon the defense of insanity and would not permit his counsel to do so (Tr. 18, 22). Appellant admitted that the affidavit was his idea and not Mr. O'Malley's (Tr. 24) and that it was "true" (Tr. 22), but stated as his reason for refusing to raise the issue of insanity the fact that "I didn't know there was anything wrong with me or that I had a mental defect or disorder" (Tr. 24). Appellant stated that Mr. O'Malley had never discussed Dr. Shapiro's report with him (Tr. 25), adding on cross-examination that if such a discussion had taken place he "believe[d]" he would have agreed to a defense of insanity because he "had no other defense" (Tr. 29).

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[5] Some time in February 1964, again at Mr. O'Malley's request, Dr. Shapiro had also submitted to the court an affidavit stating that appellant was mentally competent to stand trial (Tr. 8-9). Appellant himself in an affidavit filed at the same time stated, "I do not intend to invoke the defense of insanity in this case, and I will not permit my counsel to do so." See Tr. 22-24.

[6] Dr. Shapiro had said earlier that he never gave his patients a "definite diagnosis" (Tr. 13).

Mr. O'Malley, called as the court's witness (Tr. 39), testified that he had known about appellant's "psychiatric background" and on that basis had requested—and paid for—the report from Dr. Shapiro. After receiving the report he had further discussions with appellant about his mental condition, and appellant insisted that he did not wish to raise the defense of insanity. On one occasion while the Government's motion for mental examination was pending before the court, appellant told Mr. O'Malley, "I would rather spend ten years in jail than spend two or three months necessary for a mental examination at St. Elizabeths Hospital" (Tr. 42). Asked by appellant's counsel whether he would have advised appellant differently as to a possible insanity defense if he had known of Dr. Shapiro's diagnosis, Mr. O'Malley replied:

> For a psychiatrist to give a diagnosis as he did in his letter of January 31, 1964, and to superimpose upon that, that this would be a causal connection between a crime of impersonating a police officer, as well as robbery, as well as a sexual assault, I would find, as a practitioner with some experience involving mental defenses of insanity, it would be a most impractical approach or request to make of a jury.
>
> I would say, coupled with that defense of insanity, if you also attempted to have a defense on the merits, you would jeopardize the defendant's position as regards both defenses, and I would say that I wouldn't give too much credence, even if that was Dr. Shapiro's opinion at that time, to the causal connection opinion that he suggested, and I would have found great difficulty without first almost admitting to the jury that the defendant Holmes was guilty of all counts before interjecting a defense of insanity. (Tr. 47)

At the conclusion of the hearing the court denied the motion on the ground that "the defense of insanity is a defense which must be raised at the trial and cannot be raised on collateral attack under section 2255" (Tr. 54).

Findings of fact and conclusions of law were later entered in which the court concluded that appellant had "failed to sustain his burden of proving his allegations" and that appellant had been "effectively represented by counsel at trial."

STATUTE INVOLVED

Title 28, § 2255, United States Code, provides:

> A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.
>
> A motion for such relief may be made at any time.
>
> Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.
>
> A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.
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> The sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner.

An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

SUMMARY OF ARGUMENT

Appellant, precluded by well-established authority from raising in a § 2255 proceeding the issue of insanity at the time of his offense, is striving to inject it obliquely into the case in the guise of ineffective assistance of counsel. His claim of ineffective assistance is meritless. His retained trial counsel testified that even if he had known that Dr. Shapiro believed appellant's offenses to be the product of a mental disorder, he would have been hesitant to rely on an insanity defense because it might jeopardize his defense on the merits. Authority from this Court supports his view, as does the outcome of the trial itself: appellant was acquitted on two of the four counts of the indictment. In addition, the record demonstrates that appellant emphatically refused to assert the defense of insanity and refused to permit his counsel to do so in his behalf. Except where the defendant is obviously mentally irresponsible and there is sufficient question as to his responsibility for the crime, a defendant clearly has the right to keep the issue of insanity out of the case. Appellant's trial counsel, replying on his own best judgment as an experienced member of the bar and on his client's express wishes, refrained from raising any issue as to appellant's mental condition. Under the circumstances his decision was clearly sound. Appellant has not sustained his burden of establishing ineffective assistance of counsel.

ARGUMENT

Appellant was not denied the effective assistance of counsel

(Tr. 1-55)

Mental incompetency to stand trial at the time the trial was held is a valid ground for relief under 28 U.S.C. § 2255. *Smith* v. *United States*, 106 U.S. App. D.C. 169, 270 F.2d 921 (1959); *Lloyd* v. *United States*, 101 U.S. App. D.C. 116, 247 F.2d 522 (1957). But the question of —

> insanity at the time of the commission of the crime, which would be a defense to the indictment, . . . is not the burden of the motion to vacate. The issue of insanity as a defense is presentable upon the trial and appealable if error has been made in respect to it, and a motion to vacate under Section 2255 cannot be used as a substitute for an appeal. Therefore an alleged insanity at the time of the commission of a crime cannot be used as a basis for a motion under Section 2255. *Bishop* v. *United States*, 96 U.S. App. D.C. 117, 119, 223 F.2d 582, 584 (1955), *vacated on other grounds*, 350 U.S. 961 (1956) (citations omitted).

This rule is so well established as to obviate further discussion. See, *e.g.*, *Taylor* v. *United States*, 282 F.2d 16 (8th Cir. 1960); *Hahn* v. *United States*, 178 F.2d 11 (10th Cir. 1949); *United States* v. *Womack*, 211 F. Supp. 578 (D.D.C. 1962); *United States* v. *Wiggins*, 184 F. Supp. 673 (D.D.C. 1960).

Appellant is attempting to do by indirection what he is barred from doing directly. He is arguing the issue of insanity at the time of the offense by disguising it as a claim of ineffective assistance of counsel. Examination of the record, however, leads to the inescapable conclusion that even if his claim were cognizable under § 2255 it would be totally devoid of merit. Mr. O'Malley testified that if he had known Dr. Shapiro's opinion on the question of productivity he still "would have had great diffi-

culty" (Tr. 48) in raising the defense of insanity. His main concern was that his defense on the merits might be jeopardized.[7] His apprehensions were well founded. This Court has recognized the dangers inherent in combining an insanity defense with one on the merits and the possible prejudice which may result from the combination. *Trest* v. *United States*, —— U.S. App. D.C. ——, 350 F.2d 794 (1965); *Harper* v. *United States*, —— U.S. App. D.C. ——, 350 F.2d 1000 (1965). In addition, appellant had been most insistent on keeping the insanity issue out of the case altogether, which, generally speaking, any defendant has a right to do.[8] Thus, relying both

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[7] Contrary to appellant's assertion at page 6 of his brief that "the defense of insanity was the only defense that could be raised at the trial," it must be borne in mind that Mr. O'Malley's efforts on appellant's behalf were in some measure successful, in that appellant was awarded a judgment of acquittal on one count of the indictment and the jury found him not guilty on another count. On the other hand, if he had interposed an insanity defense, Mr. O'Malley would have had to concede that appellant had in fact committed all the offenses with which he was charged, including the two of which he was acquitted. See Tr. 47. And see *Ragsdale* v. *Overholser*, 108 U.S. App. D.C. 308, 313, 281 F.2d 943, 948 (1960).

[8] In *Whalem* v. *United States*, —— U.S. App. D.C. ——, 346 F.2d 812, *cert. denied*, 86 S. Ct. 124 (1965), this Court held that "in a proper case," where the defendant is "obviously mentally irresponsible" and there is "sufficient question" as to his mental responsibility for the offense with which he is charged, the court may inject the issue of insanity into the case against the defendant's wishes. "[I]n the pursuit of justice, a trial judge must have the discretion to impose an unwanted defense on a defendant and the consequent additional burden of proof on the Government prosecutor." The Court went on to observe, however: "No rigid standard exists to control the District Court in deciding whether it should require the insanity issue to be submitted. As a matter within the sound discretion of the District Court, this question must be resolved on a case by case basis." *Id.* at 818-819 and n.10. In *Whalem* the defendant was diagnosed as psychotic and had been civilly committed to Saint Elizabeths Hospital in the past. Appellant, on the other hand, had never been a patient in a mental hospital as far as the record shows and was afflicted only with a psychoneurosis, a far less severe form of mental illness than a psychosis. If in *Whalem* this Court found no abuse of discretion by the trial judge in failing to raise the issue of insanity against the defendant's wishes, then *a fortiori* the Court should reach the same conclusion in the case at bar.

on his own informed professional judgment and on his client's express wishes, Mr. O'Malley made a tactical decision [9] not to raise the issue of insanity. Appellee submits that in the context of this case his decision was clearly a sound one.

The only case known to appellee which seems to suggest that failure of counsel to raise an insanity defense might amount to ineffective assistance is *Plummer* v. *United States*, 104 U.S. App. D.C. 211, 260 F.2d 729 (1958). But *Plummer* is clearly distinguishable on its facts. In that case the defendant was indicted for the rape of an eleven-month-old child. Three months after the offense he underwent psychiatric examination and was found to be psychotic. Thereafter he was adjudicated mentally incompetent to stand trial and confined in an instutition. After five months in the hospital he was found to be competent, went to trial and was convicted. Under these circumstances, with a record replete with indications of mental aberration, this Court held "in effect" [10] that counsel was ineffective for failing to raise the defense of insanity. The disparity between *Plummer* and the instant case is too pronounced to require further comment.

A convicted defendant who claims ineffective assistance of counsel must allege circumstances which, if true, would shock the conscience of the court and make the entire proceedings a farce and a mockery of justice. *Diggs* v. *Welch*, 80 U.S. App. D.C. 5, 148 F.2d 667, *cert. denied*, 325 U.S. 889 (1945). This is a high standard, and appellant has not met it. All he has done is to challenge a decision by counsel not to raise a particular defense but instead to rely on other defenses. This is not enough to render appellant's conviction vulnerable to collateral attack. "It is well established that the movant in a collateral attack upon a judgment, especially one affirmed upon

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[9] See *Mitchell* v. *United States*, 104 U.S. App. D.C. 57, 259 F.2d 787, *cert. denied*, 358 U.S. 850 (1958).

[10] *Overholser* v. *Lynch*, 109 U.S. App. D.C. 404, 409, 288 F.2d 388, 393 (1961), *rev'd*, 369 U.S. 705 (1962).

appeal, undertakes a severe burden." *Bishop* v. *United States*, *supra* at 121, 223 F.2d at 586 (citation omitted). The court below correctly concluded that appellant had failed to sustain his burden of proving his allegations and that accordingly he had not been denied the effective assistance of counsel.

CONCLUSION

Wherefore, it is respectfully submitted that the judgment of the District Court should be affirmed.

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